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67/10/18 Brief for Petitioner, Terry

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 67

JOHN W. TERRY, et al., *Petitioners,*

—v.—

STATE OF OHIO, *Respondent.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF FOR PETITIONER, TERRY

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October 18, 1967.

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Opinions Below

The opinion of the trial court, that is, the Court of Common Pleas of Cuyahoga County, is officially reported as *State* v. *Chilton, et al.,* 95 Abs. 321 (September 22, 1964). This opinion is printed herein in Appendix A, *infra,* page 27.

The opinion of the Court of Appeals for Cuyahoga County, Ohio, which affirmed the convictions of the petitioners by the trial court, is officially reported as *State* v. *Terry,* 5 Ohio App. (2d) 122; 214 N. E. (2d) 114; 34 O. O. (2d) 237 (February 10, 1966), and is printed herein as Appendix B, *infra,* page 31.

The Supreme Court of Ohio did not render any formal opinion in dismissing the petitioners' appeals, *sua sponte,* on the ground that no substantial constitutional question was involved.

Jurisdiction

The judgment of the Supreme Court of Ohio was entered on the 19th day of October, 1966. Time for filing a petition for certiorari was extended by this Court from January 17, 1967 to March 18, 1967. (Appendix C, *infra,* page 43.) The petition was filed March 17, 1967, and granted May 2, 1967. —— U.S. —— (1967). The jurisdiction of this Court rests upon 28 U.S.C. Section 1257 (3).

Questions Presented

I.

Where the trial court makes a finding that the arrest of the petitioners was unlawful, does the introduction of evidence against the petitioners, which was obtained as a result of the illegal arrests, violate the Fourth and Fourteenth Amendments to the United States Constitution.

II.

Where evidence has been seized from the person of the petitioners as the product of an illegal search and seizure, whether the refusal of the court to apply search and seizure law, and the substitution therefor of a stop and frisk doctrine, is a violation of the Fourth and the Fourteenth Amendments to the United States Constitution.

III.

Where no emergency exists, and in the absence of probable cause, can a police officer acting upon bare suspicion alone stop, frisk, and search petitioners for a gun on the street, and can the Court of Appeals justify such conduct by substituting a standard of "reasonably suspects" for the "probable cause" set forth in the Fourth Amendment to the United States Constitution.

Constitutional Provisions Involved

The pertinent portions of the United States Constitution are set out below:

Amendment IV.

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment XIV.

> " * * * Nor shall any state deprive any person of life, liberty or property without due process of law * * * ."

Statute Involved

Ohio Revised Code Section 2923.01 is set out herein as Appendix D, *infra,* page 44.

Statement of the Case

Petitioners herein were indicted, tried, convicted and sentenced to the Ohio State Penitentiary for the offense of Carrying a Concealed Weapon.

Prior to the trial, the Court conducted a hearing on petitioners' pre-trial motions to suppress the evidence, to-wit: guns. The entire testimony on the motions to suppress consisted of the testimony of one police officer. The State's entire case also consisted of the testimony of this one police officer. The Court overruled petitioners' motions to suppress (R. 94, *et seq.*) and upon trial permitted into evidence, the guns, shells, and the testimony of the police officer relating to custodial conversation with the petitioner, Richard Chilton, in the jail house.

The police officer called to testify on both the motions to suppress and the trial testified that his name was Martin McFadden; that he had been a police office for 39 years and four months; and that he had been assigned to the Detective Bureau for 35 years.

He further testified that on the 31st day of October, 1963, he first observed one John Terry and one Richard Chilton standing at the corner of Huron Road and Euclid Avenue where these two streets intersect at East 13th Street in the City of Cleveland. That it was 2:00 or 2:30 p.m., and that it was broad daylight. After observing these two colored males standing at the corner talking, he positioned himself in the lobby of Rogoff's store, near 14th Street on Huron Road, for the purpose of further observation. During a period of some 10-12 minutes, he observed that one male would stand at the corner while the other one would walk up Huron Road. That this male would stop and look

into either Diamond Store or the United Airlines Office for a second or so and then continue west on Huron Road near Halle Brothers Store. He would then turn around, come back to the spot where the stores were, peer in the window, and go back to the corner where he would talk with the waiting male. Then the man who had been waiting would go through this same procedure. The testimony with reference to the number of trips each man made varied from two to three times each to four to five time apiece. (R. 14, 22, 24.)

During this 10 to 12 minute period of observation, the officer stated that he saw a short, white man come over to the corner, converse with these two colored males for a minute or so, and then walk west on Euclid.

He then observed the two colored males walk west on Euclid Avenue in a natural manner, and at Zucker's store, 1120 Euclid Avenue, he saw them stop in front of this store and again converse with the same white male.

The officer further testified that these three men were just standing in front of the store with their backs to the display window; that they were just talking; and that he approached them and stated that he was a police officer. He said that he asked them their names and that "they gave it to me quick." (R. 17) (At all other places in the records he says "they mumbled something.") Then without any further conversation between the officer and these men, and no overt act on the part of the men, the police officer conducted himself as follows:

> "A. * * * I got Chilton then, not Chilton but Terry and I turned him around and I stood in the back of them, and I searched them, and in his upper left hand pocket of his topcoat I felt a gun and I went in for it

> and I had a tough time getting it, so I took the coat off. I at that time informed them, the three of them, to keep their hands out of their pockets and walk into the store. When they got into the store I told them to face the wall, keep their hands away, and on searching Chilton in his left hand pocket of his topcoat I found a gun, a '38, and searching Katz I found nothing." (R. 16, 17)

The three men were then taken to the Cleveland Police Station where they were booked for "Investigation." A day or so later, Terry and Chilton were charged with "Carrying a Concealed Weapon," a felony, and Katz was charged with "Being a Suspicious Person," a misdemeanor.

The officer admitted that there were people on the street when this matter occurred and that the stores were open and that there was business as usual in the downtown area. He admitted that he did not know any of these men (R. 44, 119); that no one had furnished him any information regarding them (R. 43, 44, 119); and that his reason for watching them was that "they didn't look right to me at the time." (R. 119) With reference to his reason for approaching the men in front of Zucker's and turning Terry around and patting him down, the officer testified as follows: "In the first place I didn't like their actions on Huron Road, and I suspected them of casing a job, a stickup. That's the reason." (R. 42) He said that he patted them down " * * * to see what they had, if they had guns." (R. 42) However, he testified under inquiry by the Court that in 39 years as a police officer and 35 years as a detective, that he had no experience in observing individuals casing a place and had never observed anybody casing a place. (R. 46)

ARGUMENT

I.

Where an Arrest Is Unlawful, Evidence Seized as a Result Thereof and Used at the Trial Violates the Fourth and Fourteenth Amendments.

The trial court in its opinion (R. 96) stated:

> There is no evidence that any warrant had been issued for a search or frisk and I am not going to stretch the facts and say that there was a lawful arrest prior to the frisk of the defendants. I believe it would be stretching the facts beyond reasonable comprehension and foolhardy to say there was a lawful arrest, because there wasn't, from the facts as presented . . .

And then reiterated this position later in this same opinion (R. 100):

> I believe and I reiterate again that search and seizure law cannot be applied in this particular case, although Mr. Reuben Payne endeavored to show there was a lawful arrest, but the Court cannot agree. If there was an arrest it came subsequent to the frisk . . .

In setting forth its opinion regarding the question of arrest, the Court was aware of the police officer's testimony which clearly demonstrated a lack of probable cause for arrest at the time that he stopped and searched the petitioners. The clear absence of probable cause is best illustrated by the following examination of the police officer (R. 43, 44, 45):

Q. Mr. McFadden, you just said you suspected them of casing a job, is that correct? A. That's right.

Q. You were basing this— A. Pardon?

Q. You were basing this, suspecting them of casing a job, upon your observations of them, sir? A. That's right.

Q. Had anyone come up to you and given you any information regarding these two men? A. Absolutely no.

Q. Did you know these two men previously, sir? A. I do not, I didn't know the men from Adam.

Q. This would include the white fellow, Officer? A. I did not know the white man either. I never seen the three men before.

* * * * *

Q. But when you walked up to these men and you first spoke to them you did not know that these men had guns on them, did you? A. Absolutely not.

At the moment that the police officer approached the petitioners and the third man, it is apparent that he did not have probable cause to arrest. Yet after perfunctorily saying to them that he was a police officer he then relates the illegality of his actions as follows (R. 16, 17, 18):

Q. You were speaking to the three of them? A. All three of them.

Q. Will you tell us exactly what you said to them, Detective McFadden? A. I said I was a police officer. I asked each one their name, and they gave it to me quick. I got Chilton then, not Chilton but Terry, and I turned him around and I stood in the back of them, and I searched them, and in his upper left-hand pocket

of his topcoat I felt a gun and I went in for it and I had a tough time getting it, so I took the coat off.

I at that time informed them, the three of them, to keep their hands out of their pockets and walk into the store.

When they got into the store I told them to face the wall, keep their hands away, and on searching Chilton in his left-hand pocket of his topcoat I found a gun, a '38, and seaching Katz I found nothing.

* * * * *

Q. Now, taking you back for a moment to the point where you said you were a police officer and you asked their names, did each of them give you their names? A. They said something.

Q. Was this the point at which time you grabbed Terry and spun him around as you described? A. That's right.

Q. Now, had you said, other than saying to them, "What are your names?" Did you say anything else at all to them before you spun Terry around? A. No, I didn't, but I will say this—

* * * * *

Q. Now, this gun that you found on Terry was located where? A. In his upper left-hand topcoat pocket.

Q. It was not visible to you just looking at him, was it? A. No.

In light of the foregoing, and it being apparent that there was no probable cause for arrest prior to the search, the Court was correct in making its finding that the arrest in this case was not legal. Since, as the Court said, "if

there was an arrest it came subsequent to the frisk," the illegal search and seizure which yielded the gun cannot provide the probable cause which was absent at the time of the stop, the frisk, and the search. Therefore, based upon its findings, it was incumbent upon the Court to suppress the evidence which was the product of an illegal search and seizure and the failure of the Court to suppress was violative of the Fourth and Fourteenth Amendments. *Mapp* v. *Ohio,* 367 U.S. 643 (1961).

Permitting the police to stop and frisk and thereby acquire probable cause would no doubt subject some guilty persons to the arms of the law. In the main, however, it would leave the large majority of decent citizens subject to the whim and caprice of police officers and on the street, "stops", "pats", "frisks", and "searches".[1] Resultantly, the police might not acquire probable cause, but the citizen would most assuredly surrender freedom and dignity without any redress for the temporary arrest and indignity which yielded no illegal product and no probable cause.

The trial Court here ruled that there is a distinction between stopping and frisking and search and seizure. (R. 98). As a basis for such a distinction the Court cited *Ker* v. *California,* 374 U.S. 23 (1963) as being authority for the States being able to establish their own rules and standards pertaining to search and seizure so long as those rules and standards do not violate the substance and spirit of the Fourth Amendment.

It is impossible to square this distinction by the trial Court with *Ker* in light of the court's reliance upon a term

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[1] 52 Northwestern University Law Review 16, by Caleb Foote (1957): Law and Police Practices: Safeguards in the Law of Arrest.

known as "reasonable cause",[2] not heretofore known to be either part substance or spirit of the Fourth Amendment. After stating that the police officer had "reasonable cause" to approach them and pat them the court then said (R. 98):

> Had he gone into their pockets and obtained evidence, an an example, narcotics or illegal slips, there would be no question of an illegal search and seizure . . .

The establishment of such a distinction, without a difference, and the refusal of the Court to apply search and seizure law as set forth in *Mapp* v. *Ohio, supra,* and *Beck* v. *Ohio,* 379 U.S. 89 (1964) is clearly violative of the Fourth Amendment.

The pronouncement in *Ker* permitting the States to develop workable rules does not authorize them to establish standards below the minimal ones required by the Fourth Amendment. And, if the trial Court would have applied search and seizure law to contraband found on the petitioners, he cannot deny them the Fourth Amendment protections merely because guns were found as a result of a search, termed a "frisk".

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[2] "Book Review," by Yale Kamisar, 76 Harvard Law Review 1502 of Report and Recommendations of the Commissioners' Committee on Police Arrests for Investigation, by Robert V. Murray wherein Kamisar cites the following at page 1505:

> . . . the Fourth Amendment prohibits 'seizures' without probable cause. No matter how frequently or deceptively the word 'reasonable' is utilized in formulating a standard for detentions or arrests for investigation—'reasonable circumstances,' 'reasonable suspicion,' 'reasonable grounds to suspect' —any standard less than 'probable cause' is 'unreasonable' in the constitutional sense.

Note: Kamisar's comment at page 1511:

> I submit that many of the Uniform Arrest Act Provisions were fatally defective as early as Wolf v. Colorado. . . .

Generically speaking, whether the police officer "frisks", "taps", "pats", or "searches", the result is a search,[3] and a search incident to an unlawful arrest is constitutionally prohibited. There is no distinction where there is no probable cause. If one "taps", "pats", or "frisks", for narcotics or policy slips, and the finding of them is an illegal search, then also if one "taps", "pats", or "frisks", for a gun, and finds it, it is still an illegal search.

Rather than providing the Trial Court with a basis for distinction, *Ker* (at pp. 34-35), in fact sustains the petitioners entitlement to suppression. In its contortive effort to sustain the frisk and illegal search without probable cause the court failed to adhere to the portion of *Ker* which was applicable to this situation, which is:

> The evidence at issue, in order to be admissible, must be the product of a search incident to a lawful arrest, since the officers had no search warrant. The lawfulness of the search without warrant, in turn, must be based upon probable cause, which exists "where 'the facts and circumstances within their (the officers') knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." *Brinegar* v. *United States,* 338 U.S. 160, 175-176 (1949), quoting

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[3] Webster's Third New International Dictionary, Volume I (1961): "frisk . . . 2a: to search or go through esp. for concealed weapons or stolen articles . . . esp. to search (a person) for such purpose usually by running the hand rapidly over the clothing and through the pockets . . ."

Also see Webster's Collegiate Dictionary, Fifth Edition (1948): "Frisk . . . 2. Slang. to search (a person) by running the hand over the clothing, through pockets, etc.; hence, to steal from in such a manner."

from *Carroll* v. *United States,* 276 U.S. 132, 162 (1925); accord, *People* v. *Fischer,* 49 Cal. 2d 442, 317 P. 2d 967 *Bompensiero* v. *Superior Court,* 44 Cal. 2d 178, 281 P. 2d 250 (1955).

II.

The Substitution of a Judicial "Stop and Frisk" Doctrine for "Probable Cause" Violates the Fourth and Fourteenth Amendments.

The lawfulness of the arrest in this case must be tested by the Fourth Amendment, and since the arrest was without a warrant, it must be based upon probable cause. *Wong Sun* v. *United States,* 371 U.S. 471 (1963); *Henry* v. *United States,* 361 U.S. 98 (1959).

Probable cause cannot be retroactively supplied by the evidence uncovered. *Rios* v. *United States,* 364 U.S. 253 (1960); *Henry* v. *United States,* 361 U.S. 98 (1959); *Johnson* v. *United States,* 333 U.S. 10 (1948); *City of Lakewood* v. *Smith,* 1 Ohio State, 2d 128 (1965).

The Ohio Court of Appeals justified their substitution of a "stop and frisk" doctrine for "probable cause" on the rationale that a police officer of thirty-nine years experiance "reasonably suspected" that the defendant was "casing" a store with robbery in mind. The Court then said: "It was also logical for this experienced detective to presume that the defendant was armed and dangerous."

Yet we find such rationale to be contra to the actual facts in the case. This is demonstrated vividly in the following colloquy between the police officer and the Court (R. 46, 47):

By the Court:

Q. You have mentioned about casing a place. In ordinary language what do you mean by casing? A. I mean waiting for an opportunity.

Q. Of doing what? A. Of sticking the place up.

Q. In your thirty-nine years of experience as an officer, and I believe you testified thirty-five years as a detective—is that correct? A. That's correct.

Q. Have you ever had any experience in observing the activities of individuals in casing a place? A. To be truthful with you, no.

Q. You never observed anybody casing a place? A. No.

* * * * *

Q. What caused you specifically to be attracted to those two individuals at the location that you have mentioned, or let me put it to you this way:

Supposing those two defendants here that are now in Court were standing across the street from here, and doing the same activities that you observed them on Huron and Euclid, would you have had any cause for suspicion? A. I really don't know.

And this further testimony (R. 160):

Q. During your tenure as a police officer, during your 39 years as a police officer, how many men have you had occasion to arrest when you had observed them and felt as though they might pull a stick-up? A. To my recollection, I wouldn't know, I don't know if I had—I don't remember of any.

* * * * *

Q. You don't remember of any, is that the last part?
A. That's true.

Then this same Court of Appeals further justified their ruling on the theory that the stopping and questioning of suspicious persons is not prohibited by the Constitution. (Appendix B, page 41) The court then proceeded to hold as follows:

> "Therefore, we hold, in line with the great weight of authority, that a policeman may under appropriate circumstances such as exist in this case, reasonably inquire of a person concerning his suspicious on-the-street behavior in the absence of reasonable grounds to arrest. . . . "

Such a holding was made by the Court in spite of a record which patently obviates any intention on the part of the police officer to inquire. The record completely negatives any such intention. Other than announcing to these men that he was a police officer and posing the singular question to them "What are your names," it is uncontroverted that no further questions were asked of any of the three men until the following day at the jail. See (R. 19, 20):

> "Q. Now, did you at that point say anything further to these three men? A. Not at that time, no.
>
> * * * * *
>
> Q. Between the time you removed this gun from Chilton, and the arrival of the other members of the police department, did you have occasion to say anything further to either Chilton or Terry. A. Not that I remember, no."

Even suspicious conduct alone does not subject a person to loss of his immunity from search of his person and exempt him from inclusion in the Fourth Amendment. *U. S.* v. *DiRe,* 332 U.S. 481 (1948); *People* v. *Ford,* 356 Ill. 572, 191 N.E. 315 (1934); *People* v. *Macklin,* 353 Ill. 64, 186 N.E. 531 (1933).

In considering whether the officer had probable cause for arrest in accordance with law, these excerpts from his testimony are of prime importance:

1. When asked at what point he considered their actions unusual, his reply was (R. 118):

> "Well, to be truthful with you, I didn't like them. I was just attracted to them, and I surmised that there was something going on when one of them left the other one and did the walking up, walk up past the store and stopped and looked in and came back again."

2. At R. 119:

> "Q. You didn't know either one of these men did you? A. I did not.
>
> Q. And no one had furnished you any information with regard to these two men, have they? A. Absolutely no information regarding these two men at all. I am telling the truth when I say that."

3. At R. 121:

> "Q. Now when you saw this white man come over and and talk to the two of them, there at the corner of Huron and 14th, did you know this white man? A. No, I didn't.

Q. You had no information with reference to this white man? A. No information on anything that I—on anything that I seen, anything that I seen I had no information whatsoever on."

4. At R. 129-134:

"Q. Well, you tell the court as you walked through the door you said 'Order the wagon' and as you further say you were then arresting Chilton, Terry and Katz—A. That's right.

* * * * *

Q. What were Chilton and Katz being arrested for? A. Association.

Q. Is that your complete answer, sir? A. Well, they were found in company with a man with a revolver.

Q. So then at that point they were being arrested for Association? A. They were being arrested, yes, period.

Q. Do you know of any charge under Ohio Law entitled 'Association'?

* * * * *

A. As far as I know, I don't know."

In view of the above it is apparent that the inquiry which the officer intended was physical and not verbal, and that he had substituted "a hunch" for probable cause. His obvious intention then was to search in order to acquire probable cause. However, the after-the-event justification does not create probable cause. An arrest without a warrant by-passes the safeguards provided by an objective predetermination of probable cause. It substitutes

instead the far less reliable procedure of an after-the-event justification for the arrest or search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment. *Beck* v. *Ohio, supra,* 142; *Wong Sun* v. *United States,* 371 U.S. 471, 479, 480 (1963).

This Court has already made it clear that good faith on the part of the arresting officer is not enough. *Beck* v. *Ohio, supra; Henry* v. *United States,* 361 U.S. 98, 102 (1959). An Ohio case in point is *Rasey, et al.* v. *Ciccolino,* Admx. 1 Ohio App. 194; 18 C.C. (NS) 331; 24 C. D. 294 (1913).

Taking the evidence in this case in its best light, considering that the police officer did not know any of these men; had no information on any them; had no knowledge of the commission of a misdemeanor or felony; had no warrant for search or arrest; and attempted no interrogation of the arrestees; this arrest occurred on the basis of suspicion alone. Such an arrest is, of course, illegal.[4]

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[4] See Mr. Justice Douglas' dissent in *Draper* v. *United States,* 358 U.S. 307; 3 LBd 2d 327; 79 S. Ct. 329 (1959) wherein he quoted from an article written by Professors Hogan and Snee of Georgetown University, 47 Georgetown Law Journal 1, 22: "It must be borne in mind that any arrest based on suspicion alone is illegal. This indisputable rule of law has grave implications for a number of traditional police investigative practices. The round-up or dragnet arrest, the arrest on suspicion, for questioning, for investigation or on an open charge all are prohibited by law. It is undeniable that if those arrests were sanctioned by law, the police would be in a position to investigate a crime and to detect the real culprit much more easily, much more efficiently, much more economically, and with much more dispatch. It is equally true, however, that society cannot confer such power on the police without ripping away much of the fabric of a way of life which seeks to give the maximum of liberty to the individual citizen. The finger of suspicion is a long one. In an individual case it may point to all of a certain race, age group of locale. Com-

Even less than what occurred here would have constituted arrest for in order for there to be an arrest, it is not necessary that there be an application of actual force, or manual touching of the body, or physical restraint which may be visible to the eye, or a formal declaration of arrest. It is sufficient if the person arrested understands that he is in the power of the one arresting, and submits in consequence. *Kelly* v. *United States,* 111 U.S. App. D. C. 396 (1961).

When the police officer, without probable cause, approached these three men who had committed no crime, and who were standing on a public street conversing, and were restricted of their liberty of movement, and subjected to search in public view, their arrest was complete. The product of such a search was illegal as the act which produced the fruit.

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monly it extends to any who have committed similar crimes in the past. Arrest on mere suspicion collides violently with the basic human right of liberty. It can be tolerated only in a society which is willing to concede to its government powers which history and experience teach are the inevitable accoutrements of tyranny."

Also see *Vagrancy and Arrest* on Suspicion, by William O. Douglas, Associate Justice, United States Supreme Court, 70 Yale Law Journals, at page 12: "There is no crime known as 'suspicion' nor is there any Federal crime known as 'holding' for 'investigation' . . . Arrests for suspicion are not countenanced by the Bill of Rights. The Fourth Amendment allows arrests—as well as searches—only for 'probable cause'. . . . Under our system the arrest is warranted not by what the police discover afterwards but by what they knew at the time . . . The result is that arrests on 'suspicion' are unconstitutional at the local, as well as at the federal level."

III.

Substituting the Standard "Reasonably Suspects" for "Probable Cause" Violates the Fourth and Fourteenth Amendments.

This Court has made it plain that federal applications of Fourth Amendment concepts, while not placing a straight-jacket on state process, does provide a minimal standard for all courts. *Ker* v. *California,* 374 U.S. 23 (1963). In fine, *Ker* provides a foundation upon which the State courts may build but not undermine:

> Findings of reasonableness . . . [by state trial courts] are respected only insofar as consistent with federal constitutional guarantees. As we have stated above and in other cases involving federal constitutional rights, findings of state courts are by no means insulated against examination here. . . . (bracketed material supplied) *Ker* v. *California,* at pp. 33-34

When the Ohio Court of Appeals asserts:

> . . . There is no mandate in the Mapp opinion that the states henceforth must abide by all the interpretations of the federal courts. (Appendix B, page 41)

it ignores *Ker* and misstates the rule by half. The thrust of *Ker* is that the States may extend, but not contract federal applications of the Fourth Amendment.

Relying on its own dictum the Court of Appeals decision[5] proceeds to rationalize it pragmatically by stating

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[5] The Supreme Court of Ohio dismissed the petitioners' appeals *sua sponte* without opinion on the ground no substantial constitutional question was involved.

flatly that "The necessities of law enforcement in large urban areas require the procedures utilized in the instant case". (Appendix B, page 31)[6]

In the interest of this purportedly pragmatic objective the Court of Appeals hinges the propriety of the ultimate arrest largely upon whether the detective in this case had, in the first place, a right to stop and question the petitioners and—from that enterprise—acquired "reasonable grounds" to make the frisk, which produced the gun and validated the consequent arrest. (Appendix B, pp. 39-41)

This syllogism is used by the Court to uphold the police action and the admissibility of the acquired evidence even though there was no ground for arrest prior to the questioning (R. 47, 118-121), nothing in response to the questioning to raise probable cause (or for that matter reasonable ground or any other ground) for arrest (R. 16-20), and *no arrest* until *after the petitioners had been physically handled* (R. 127)[7] because of the detective's feeling that "they may have a gun" (R. 44-47, 118-121, 137), and the guns discovered.

In this posture, these petitioners and, more importantly, all citizens are at the mercy of the police "sixth sense" and the situation is not improved by the Appellate Court's arrest liturgy:

> "It is readily apparent that a required element of an arrest is the *intent* of the officer to arrest. . . . In the

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[6] We resist the temptation to comment on the implication that observance of constitutional standards undercuts law enforcement.

[7] The Court of Appeals below specifically held that the arrest did not take place until after the officer found the gun. (See Appendix B, p. 39.) Necessarily the "search", i.e. frisk, preceded the cause for arrest on the facts of this case.

> instant case, when the detective approached the defendant, he had, . . . no intention at all to arrest, but only to inquire as to the defendant's activities." (Appendix B, p. 37)

For whatever may be said of intent as an element in arrest, on this record there was nothing in the questioning to raise probable cause to arrest (only names were asked for and given R. 17) and no arrest made until after a physical invasion of the petitioners' persons and, therefore, no justification for the search as incidental to a valid arrest.[8] This obvious point ought not be blurred or glossed over by simple incantation about intent.

It is apparent the Court below treated "reasonable grounds" as a standard less demanding than "probable cause".[9] What it is saying, in effect, is that an occasion for questioning which raises no probable cause may legalize a search which may yield fruits in turn legalizing an arrest and it matters little whether one talks of "reasonable grounds" or "probable cause" for both depend upon the illegal acquisition for their existence. Petitioners had thought the day long past when "fruits" would qualify a search.

The argument that necessity requires such a result ought not to be persuasive. There has never been a time when

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[8] To avoid illegal arrest, the court below apparently finds *no* arrest. Even if this was an aid, it is possible to wonder what petitioner's status was as the detective's sixth sense took him into and through petitioners' pockets.

[9] Any problem in equating probable cause and reasonable grounds was avoided in *Berger* v. *New York* (S. Ct. 6/12/67) 35 L. W. 4649, 4652 by the parties' agreement that the concepts were equivalent under the New York law.

some practical argument could not be mounted to justify law enforcement outrages. No doubt the thumb-screw and the rack would "aid" law enforcement from some points of view. However, we have staked our Constitutional and governmental lives on the policy of the Fourth Amendment —a policy no doubt that involves some risk. But "Constitutional law, like other mortal contrivances, has to take some chances", Mr. Justice Holmes in *Blinn* v. *Nelson,* 222 U.S. 1, 7 (1911).

And it is a serious question whether ordered government does not run greater risks from tinkering with the fundamental concepts [e.g. the substitution of "reasonable grounds", a term of little experienced content for probable cause—a concept made meaningful by extensive interpretation] than in adhering steadfastly to constitutional fundamentals. However, it is again emphasized that a wordy formulation will not cure the evil here. For the fruits of an illegal search were used to justify an arrest which concededly came *after* the search.

The struggle for liberty has been too long and too bitter to surrender the privacy of one's person to the subjective vagaries of a policeman's mind. It is not his intent nor his sixth sense which must determine constitutional rights but objective facts supporting probable cause and no warrantless invasion of the person can stand unless present probable cause for arrest has culminated in arrest *before* the intrusion.

The Court below finds historical support for its view that "proper" authority may stop and question persons in suspicious circumstances. We are told that this "right" to question has roots in "early English practice where it

was approved by the courts and common law commentators". (Appendix B, p. 31) One may concede a right to stop and question under proper circumstances without ever reaching the heart of the question in the present case. For in this case far more than questioning is involved. Here, the questioning did not go beyond identification. Therefore, there was no reason for the invasion of the person which took place. Under such circumstances early English authority is of little consequence. Nonetheless it is worth noting that the Fourth Amendment is, in large measure, a product of a revolution against English law as applied to the American colonies. It is not an accident that so many colonies adopted bills of rights or their equivalent nor that so many emphasized their abhorence of general warrants. See, p.e. *The Virginia Declaration of Rights,* 10. Moreover, security for liberty is planted in quicksand if too much confidence is placed in support acquired from English law in the 17th and 18th Centuries. The *Areopagitica* was not generated by a free press and history can provide many English examples unduly limiting liberties now taken for granted both here and in England. See Rutland, *The Birth of the Bill of Rights—1776-1791* Chapter 1.[10] It can never be emphasized enough that those liberties were not secured by ambiguous exceptions to basic safeguards.

The Fourth Amendment is essentially a procedural guarantee. As such it protects those "indispensable essence[s] of liberty" so dramatically described by Mr. Justice Jack-

[10] Collier Books Edition 1962. Originally published by the University of North Carolina Press for the Institute of Early American History and Culture, Williamsburg, Virginia.

son in *Shaughnessy* v. *United States,* 345 U.S. 206, 224 (1953):

> Only the untaught layman or the charlatan lawyer can answer that procedures matter not. Procedural fairness and regularity are of the indispensable essence of liberty. Severe substantive laws can be endured if they are fairly and impartially applied. Indeed, if put to the choice, one might well prefer to live under Soviet substantive law applied in good faith by our common-law procedures than under our substantive law enforced by Soviet procedural practices.

Petitioners urge this Court to preserve the procedural essence of the Fourth Amendment by repudiating the exception carved out by the court below, accompanied by a clear direction that State procedures will satisfy Due Process only if Federal constitutional standards are observed.

Conclusion

It is our position that the substitution of a stop and frisk doctrine or any standard less than the probable cause standard set forth in the Fourth Amendment violates both the Fourth and Fourteenth Amendments.

We invite an independent examination of the record in this case by this Court in order to determine the petitioners' constitutional rights. In *Beck* v. *Ohio, supra,* this Court said:

> . . . While the Court does not sit as in nisi prius to appraise contradictory factual questions, it will, where necessary to the determination of constitutional rights,

> make an independent examination of the facts, the findings, and the record so that it can determine for itself whether in the state court findings, such as a finding as to the reasonableness of a search and seizure, the constitutional criteria established by the Supreme Court have been respected.

In view of this, we cannot believe that where the trial court has found an arrest to be unlawful, that it can then admit evidence seized incident to the unlawful arrest, refuse to apply search and seizure law, and justify the same on a doctrine of "stop and frisk". Justice Roger J. Traynor in his article, "Mapp vs. Ohio at large in the Fifty States," Duke Law Journal, Volume 1962, page 319, said this:

> The exclusionary rule of 1961 that now binds all the states is no mere rule of evidence, but part and parcel of the Constitution. It took time to deliver it to its destiny, but there is no longer any question that it has arrived.

This conviction should be reversed and the evidence suppressed.

Respectfully submitted,

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